

ELECTRONIC DISCOVERY & INFORMATION GOVERNANCE

Tip of the Month



Preserving Electronically Stored Information When Employees Depart

Scenario:

A large company has reorganized its operations and plans to terminate or reassign a number of employees. The company's head of litigation knows that some of the affected employees are subject to a litigation hold and wants to ensure that data is not lost or misplaced as a result of employees leaving the company. There is a particular concern as the company permits employees to use their own devices for company communications and other purposes.

Planning for Employee Departures

It is unlikely that an employee in career transition (for whatever reason) is thinking about a former employer's legal obligation to preserve electronically stored information (ESI). Likewise, the IT department is focused on managing assets (e.g., PC's, laptops, tablets, smartphones) and server space (e.g., email servers and personal drives on network), and views an employee departure as an opportunity to reduce IT-related costs. Nevertheless, a company's obligation to preserve ESI relating to current or anticipated litigation remains in place regardless of any employee terminations or transitions.

Courts and regulators require that companies make good faith, reasonable efforts to preserve ESI of departing employees that is subject to a legal hold. Therefore, it is important for a company to implement procedures aimed at preserving and collecting, if necessary, ESI associated with its departing and transitioning employees.

The Employee Leaves, But the Hardware Stays

While it is common for a company to reuse electronic equipment after an employee leaves the organization, doing so can result in the inadvertent destruction of ESI subject to a legal hold. IT departments managing a company's computers, storage devices and smartphones, or similar devices, often do not learn that information stored on a departing employee's device may be subject to a legal hold until after the equipment has been wiped clean and reissued.

One way to preserve ESI is to institute a waiting period before reintroducing previously used electronic devices back into the current workforce. The exact length of any waiting period depends on the size and culture of the company, but it should be long enough to allow the company to determine whether any departed employees were subject to an existing legal hold. The waiting period should also provide sufficient time to coordinate any necessary data preservation measures.

During this waiting period, a company should not delete any of the departing employee's emails or other ESI. Ensuring your company has enough time to determine whether it should preserve a

former employee's electronic data before reusing the electronic equipment (or deleting the data) is an excellent way to help avoid the inadvertent destruction of ESI.

If possible, the company should develop standard operating procedures around the management of ESI of departing employees, so that the business, IT, records management, compliance and legal department each has a clearly defined role in making sure that ESI that should be retained, is retained, and, equally as important, that any ESI that need not be retained is destroyed in a timely manner consistent with the organization's document retention policies.

The Employee Leaves and Takes the Hardware

It is becoming more commonplace for companies to permit employees to use their own devices for company communications and other company purposes. The email and documents accessed on these devices may be stored on the company's server, on the device, or both. If a company permits employees to "bring-your-own-device," or even if employees are permitted to retain some devices (i.e., smartphones or tablets) upon termination, the company can consider developing a policy or practice ensuring that all company-related ESI is in the company's control before the employee departs with the device.

Alert New Employees that a Litigation Hold Is In Place

Another risk can occur when a new or reassigned employee is unaware that a legal hold is in place. Therefore, it is important to promptly identify those new employees who inherit data that is subject to a legal hold. That new or reassigned employee should be informed of the company's obligation to preserve the data in the former employee's files and, if applicable, of any continuing obligation to preserve future information.

Keep Litigation Hold Lists Current

A company's personnel will not likely remain static for the duration of a lawsuit or an investigation. Thus, companies should periodically review their litigation hold lists to determine whether any departed employees remain among the listed document custodians and, if so, whether any new employees who took possession of the departed employee's data should be added to the list. Companies that do not maintain lists of employees subject to a legal hold should consider implementing a process to retain this information in a convenient and accessible manner.

Investigate ESI Issues through Exit Interviews

It is prudent to institute a practice where all departing employees are asked, prior to leaving, whether their data is subject to a legal hold. Not only does this provide an opportunity to confirm where the data resides, but it also prompts the company to be alert to preserving a departing employees' information while transitioning employees out of the company. If the departing employees' responses are documented, this helps to create a record of the company's good faith efforts at preserving ESI.

In certain circumstances, a legal hold may extend to information stored on an employee's personal email, home computer or other personal device. For this reason, companies should also ask whether the departing employee ever used personal email or personal storage devices (such as thumb drives) to store company ESI that is subject to a legal hold. With this knowledge, companies are better equipped to determine whether additional steps may be needed to preserve such data to ensure compliance with an existing legal hold.

Collecting ESI in Advance of Terminations or Transitions

Employee terminations can put any company in a temporary state of flux. However, a company's ongoing duty to comply with legal holds remains unaffected. Consider taking proactive steps during this period to ensure that ESI is not accidentally lost along the way. These steps could include:

- Backing up the electronic data of employees subject to a legal hold in advance of any downsizing event;
- Collecting responsive ESI from departing employees; and
- Promptly revoking any former employee's ability to access company email or electronic devices immediately upon termination in order to prevent the accidental (or intentional) deletion of ESI by employees whose interests may no longer be aligned with the company's.

Dealing proactively with departing employees' ESI is good records governance regardless of any legal holds; however, the stakes are raised considerably when the ESI is subject to such a hold. When ESI subject to a legal hold goes missing, courts can respond by issuing sanctions, and regulators can respond by refocusing their investigation on the company's compliance with subpoenas. Departing employees can compromise a company's ability to comply with its obligation to preserve responsive data. Therefore, companies should consider taking steps to ensure that changes in the makeup of its workforce do not impact the company's ability to satisfy its obligation to preserve ESI.

For inquiries related to this Tip of the Month, please contact Anthony J. Diana at adiana@mayerbrown.com or Kim Leffert at kleffert@mayerbrown.com.

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